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Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 123.

ROYAL INSURANCE CO., Plaintiff in Error,

v.

WILLIAM B. STINSON.

Writ of Error to U. S. Circuit Court for District of Massachusetts.

BRIEF FOR PLAINTIFF IN ERROR.

CHAS. THEO. RUSSELL,
CHAS. THEO. RUSSELL, JR., } *Counsel.*

T. R. MARVIN & SON, PRINTERS, BOSTON.

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Plaintiff in Error,

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BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

The defendant in error, on July 16th, 1875, was insured by the plaintiff in error "from loss or damage by fire" to "the property hereinafter described, not exceeding the sum specified on each article, viz., five thousand dollars on his interest as contractor and builder in frame hotel building, known as the Webster House, in Marshfield, Mass." By the policy of insurance issued to the defendant in error, the plaintiff in error agreed "to pay or make good to the insured all such loss or damage by fire as shall happen to the property above mentioned, subject to the conditions hereon endorsed." The action was brought upon this policy.

Policy of Insurance. Record, pp. 11–14.

The insurance was to continue from July 13th, 1875, to Sept. 15th, 1875, and during this time, Sept. 8th, 1875, the building was totally destroyed by fire.

The interest of this defendant in error in the property upon which this insurance was obtained was as follows: He made, April 6th, 1874, a contract in writing with one Flint in which he agreed,

upon certain terms and conditions, to build and furnish materials for building this hotel upon Flint's land.

Contract, Record "A," pp. 8–9.

Before this contract was made, Flint had mortgaged this land, February 7th, 1873, to one Allen, to secure the sum of $1,200 payable in one year, and $15,800, payable in five years from this date.

Mortgage, Record "D." pp. 14–16.

So that when the building contract was made, Flint owned only the equity of redemption in the land upon which the building was to be erected. Allen, June 23d, 1873, assigned this mortgage to one Deshon, who, on August 20th, 1874, made the required entry, and filed the proper certificate of entry, for the purpose of foreclosing the mortgage for breach of condition, under the General Statutes of Massachusetts. Upon such entry the estate vested in Deshon, subject to Flint's right to redeem the same within three years after such entry.

Gen. Sts. Mass. ch. 140, § § 1, 2, 7, 13. *Post p.* 24.

Assignment and Certificate. Record "E" pp. 16, 17.

After the defendant in error had made this building contract with Flint, he proceeded to work and furnish materials under it, and by September 4, 1874, had nearly completed the Building, when he ceased to work, and abandoned the contract on account of Flint's failure to make the agreed payments as the work proceeded. He then, within thirty days, Sept. 18th, in order to have a mechanic's lien for the labor and materials furnished, filed with the Town Clerk a statement of his claim amounting to $19,391.40, as required by Statute.

Gen. Sts. Mass. ch. 150, § § 5, 20. *Post p.* 25. 26

Statement of Claim. Record "A" pp. 19–29.

And afterwards, Sept. 22d, 1874, within 90 days after ceasing work, he filed in the Superior Court, a Petition to enforce his lien, as required by Statute.

Gen. Sts. Mass. ch. 150, § § 7, 8, 11. *Post p.* 25, 26

Petition. Record, F. (A.) p 19.

The petition remained in Court without further prosecution or action, until the February Term, 1876, when, after the fire, by agreement between Flint and defendant in error, it was entered "Neither Party," and so discontinued. By such discontinuance the lien was destroyed and lost.

Under the Statute the mortgage by Flint to Allen, being recorded before the date of the building contract, took precedence over the mechanic's lien of the defendant in error, so that Deshon's title under his entry to foreclose was not affected by the lien.

Gen. Sts. Mass. ch. 150, §§ 3, 33. *Post. p.* 25, 27

At the trial in the Circuit Court the plaintiff in error contended, upon these facts, that said lien attached only to, and said insurance was only upon the lien interest of defendant in error in, the equity of redemption; that the loss to be paid was not the whole amount of insurance up to the value of the building, but only the loss to this limited interest therein; and that therefore it was open to the plaintiff in error to prove that said equity of redemption was worthless, and upon such proof, the defendant in error could recover nothing, or only nominal damages, and it asked the court so to instruct the jury, but the court declined so to do, and the plaintiff in error excepted.

And the plaintiff in error further contended that, as the defendant in error had abandoned his suit to enforce said lien, by voluntarily dismissing it before judgment of the court was obtained, the lien was lost, and became void *ab initio*, and the defendant in error had therefore no interest upon which he could recover the insurance; and further, that such dismissal was such an interference with the right of the plaintiff in error to subrogation and otherwise, as to prevent a recovery of the insurance; but the court declined so to instruct the jury, and the plaintiff in error excepted.

The jury found a verdict for the defendant in error for the full amount of insurance, $5,000, and interest thereon.

ASSIGNMENTS OF ERROR.

The Plaintiff in error relies upon the following assignments of error:—

(1.) That the Court erred in declining to instruct the jury, as requested, that "if they should find that the value of the building insured was not greater than the amount of the note secured by the mortgage upon it to Allen, then there would be no value in the interest insured, or only so much value as there might be in the building as property over and above such mortgage, and which would have been applicable to the lien of the plaintiff."

Instruction asked. Record, p. 6.

(2) That the court erred in declining to instruct the jury, as requested, that "under the statutes of Massachusetts the lien of the plaintiff was subject to the mortgage of Flint to Allen, and that the plaintiff's insurable lien interest for which he could recover in this suit was limited to his interest in the property insured, and that such interest would be only his lien and its value over and above all prior valid incumbrances, for which incumbrances he should be or was in no way responsible."

Instruction asked. Record, p. 6.

(3) That the court erred in declining to instruct the jury, as requested, that "if the building or property insured was, when the insurance was made and the loss occurred, of no value over and above the mortgage of Flint to Allen, the plaintiff could recover only nominal damages."

Instruction asked. Record, p. 6.

(4.) That the Court erred in instructing the jury, that "if the plaintiff had such builder's lien when the policy was effected, and it was a builder's lien for a given amount which could have been enforced by the decree of the appropriate Court, and recovered that equity of redemption on that property, that then he is entitled to recover, without regard to the question what his equity of redemption might or might not have realized at an auction sale."

Instruction given. Record, p. 7.

(5.) That the Court erred in instructing the jury that "if they found that a party has a valid and subsisting second security for a given amount, and he enters into a contract of indemnity against the destruction of that security, and a loss by fire occurred, both parties having full knowledge of the state of the property, and the title, when the contract is entered into, that such insurance would cover that second security, although by the subsequent course of events the older and prior security might have swept away the value of the second."

Instruction given. Record, p. 7.

(6.) That the Court erred in instructing the jury that "if they found in this case that this plaintiff had a valid claim for a given amount subsisting at the time of the loss, and which he had done everything that was required of him to enforce up to the time of the loss, and that it was such a claim, for instance as he could have recovered a judgment for $5,000, or $6,000, or $8,000, and a judgment against that equity of redemption in that property, that that

was, for the purposes of this trial, an insurable interest, and an interest which he had in that property, whether by any course of events that property might have been by subsequent events more or less affected, and for the purposes of this trial, the Court instructed the jury to so consider it."

Instruction given. Record. p. 7.

(7.) That the Court erred in declining to instruct the jury, as requested, that, if after filing the statement of lien, and bringing the petition to enforce it, as required by the statute, "a judgment or determination was made in said suit, that the plaintiff could not recover anything on such lien; or if said suit was, by his consent or otherwise, properly dismissed, so that no recovery could or can be had thereon, then the plaintiff ceased to have an interest in the property insured, and can recover nothing, or in any event, only nominal damages in this suit."

Instruction asked. Record, p. 5.

(8.) That Court erred in declining to instruct the jury, as requested, "that upon the foregoing facts, if the plaintiff, on the 13th day of July, 1875, effected the policy in suit, it cannot, under the then existing circumstances, be construed to include and cover any other interest than the plaintiff's lien, then sought to be enforced in the process pending. That the plaintiff had then, under the Massachusetts statute, no other lien, and that this lien could only be preserved and made effective by prosecution under said statute, as therein provided. That he had no other insurable interest in said building. That the judgment or dismissal of said petition would relate back to its inception, and in effect determine that the plaintiff then had no lien upon and so at the date of the policy, no insurable interest in said building."

Instruction asked. Record, p. 5.

(9) That the court erred in declining to instruct the jury, as requested, "that if the plaintiff then had an insurable interest by reason of said lien on said building, any voluntary release by him of the same, by dismissing said process or otherwise would be such an interference with or action upon the defendant's rights of subrogation, or otherwise, as to prevent a recovery by plaintiff in this suit."

Instruction asked. Record, p. 5.

(10) That the court erred in instructing the jury, "that the statutes of Massachusetts declared upon what conditions this lien

shall attach. These were conditions precedent to the lien attaching; and if the plaintiff in this case had complied with these conditions precedent to the lien attaching, and it was a valid and subsisting lien at the time the contingency contemplated in the policy of a loss by fire occurred, that it was immaterial, for the purposes of this inquiry, whether he did or not subsequently perform those acts, the non-performance of which as conditions subsequent might have dissolved the lien."

Instruction given, Record, p. 6.

(11.) That the Court erred in instructing the jury, — "that the question for consideration is what the extent and value of the lien was, as it subsisted at the time when the contingency occurred contemplated by the policy: — and if he had a valid and subsisting lien which he could enforce for a given amount, and which had a given value at the time of the loss by fire, then he would not relieve the Insurance Company from liability to indemnify him for that loss thus occasioned and that value which had been destroyed by fire, although he afterwards might have done certain acts by way of failure, to prosecute that lien, or to enforce it by appropriate legal remedies which would if there had been no fire, have made that lien void. If he comes after the fire to say that he will look to the indemnity which he has secured to himself by the insurance, and take the value from the Insurance Company, and not prosecute his double remedy against the property itself, and he elects so to do, for the purposes of this trial, the Court instructed the jury that that does not defeat his remedy against the Insurance Company."

Instruction given. Record, pp. 6–7.

BRIEF OF THE ARGUMENT FOR THE PLAINTIFF IN ERROR.

I.

The first six assignments of error may be considered together, as in effect raising the same question,— Should the defendant in error, as we contend, upon the facts be confined in his recovery to the loss by fire to the equity of redemption, and so recover only the value of the property destroyed, over and above the amount for which it had been mortgaged? — Or could he recover, as the Court in effect ruled, the full amount of insurance, provided the debt for which he claimed a lien amounted to, and the building destroyed was worth, the amount of insurance?

I. Upon this question it is necessary to determine exactly what was insured. The insured is bound by the description of interest in the policy; as "the extent of his interest must always influence the underwriters in taking or rejecting the risk and in estimating the premium. . . . . Underwriters do not rely so much upon the principles as on the interest of the insured; and it would seem therefore to be always material that they should know how far this interest is engaged in guarding the property from loss."

Columbia Ins. Co. v. *Lawrence*, 2 *Pet.* 25, 49.
S.C. 10 *Ib.* 507.
Carpenter v. *Prov. Wash. Ins. Co.* 16 *Ib.* 495.

The interest stated is "as contractor and builder," that is, a mechanic's lien. Such a lien is "a mere incidental accompaniment as a means of enforcing payment. . . . . It is not a judgment, and does not give the mechanic a right to his debt, which arises out of the performance of the contract, and exists without the aid of statute. It does not confer an independent right, or create an estate in the property itself, or give any interest which would support an action of ejectment. . . . . The absolute ownership of land and powers incident to property are not, in the slightest degree, suspended by its operation; nor are prior incumbrances interfered with. It does not give any right of possession of the property as against the owner."

Phillips, Mechanic's Lien, § 9.

This lien was then simply a charge on the owner's interest in the land and building at the time the work commenced; and to whatever interest the owner has conveyed before the lien, it does not attach. "Mechanics are not entitled to a lien on any greater interest in property than their employer has. They are bound to know, at their peril, the extent of interest in the land of those they credit."

Phillips' Mechanics' Lien, § 186.
Belding v. *Cushing*, 1 *Gray*, 576.
Bishop v. *Boyle*, 9 *Ind.* 169.

And such lien cannot attach to or interfere with the estate or interest of a pre-existing mortgagee, without his consent.

Phillips' Mechanic's Lien. § 67.
Dewey v. *Fifield*, 2 *Wis.* 73.
Dean v. *Wheeler*, *Ib.* 224.
Schmidt v. *Gilson*, 14 *Ib.* 514.
Cox v. *Broderick*, 4 *E. D. Smith* (*N. Y.*) 721.

The interest of defendant in error was merely a statutory lien, depending for its existence and continuance upon strict compliance with the requirements of the statute.

Gen. St. Mass. ch. 150, *post p.* 25

And this statute does not give a lien upon the real estate generally, but only upon the contractor's interest in it. This interest was only an equity of redemption, the premises having been mortgaged to Allen, who, before the statement of lien was filed and the insurance effected, had made the proper entry to foreclose the mortgage.

Record, p. 4.

The statute expressly provides that "Such lien shall not avail or be of force against any mortgage actually existing, and duly recorded prior to the date of the contract under which the lien is claimed." (*Ch.* 150, § 3.) Post p. 25

The statute carefully confines the lien to the interest of the contractor at the time the contract is made. Thus it distinguishes between premises subject to attachment, and premises mortgaged: — in the former case the lien attaches to the whole property, and in the latter only to the equity. Section 28, of chapter 150, (post. p. 26) provides that "if the interest of the owner is under attachment the interest of the attaching creditor shall be preferred," to a certain extent, and "the court shall ascertain what proportion of the proceeds of sale shall be held subject to the attachment," etc. The lien holder then may sell the whole property and out of the proceeds may satisfy preexisting liens. (*Sections* 29–32 *of same act. Post. p.* 27) But he has no such right against a pre-existing mortgagee; — for, if the contractor "has an estate for life or any other estate less than a fee-simple in the land or if the property at the time is mortgaged or under any other incumbrance, the lien before provided for shall bind his whole estate and interest therein in like manner as a mortgage would have done: — and the creditor may cause the right of redemption or whatever other right or estate the owner had in the property to be sold," &c. (*Ch.* 150, § 33, *post. p.* 27)

Equities of redemption are thus classed with leasehold interests, and other interests less than the fee simple. In each case the mechanic's lien is restricted to the interest possessed by the contractor.

This construction of the Statute is adopted by the Massachusetts Courts. Thus in construing section 33, the Court said,—"This section does not purport to establish a rule to determine priorities between conflicting claims upon the property, or to fix the time when liens shall attach. It was enacted *alio intuitu*. The preceding sections furnish a remedy in cases where the person whose property is affected by the lien is the absolute owner, and provides that if the lien is established, the Court shall order a sale of the property. This provision is not applicable to cases in which the debtor has a less estate than an absolute estate, and therefore it was necessary to make provision for such cases. Accordingly the 33d section provides a remedy in cases where the person for whom the work is done has a less estate than a fee simple, or where the property is subject to a mortgage or other incumbrance, which is preferred to the lien, and in which the creditor cannot sell the whole property, but only the interest to which his lien has attached."

Morton, J. *Dunklee* v. *Crane*, 103 *Mass.* 470, 472.

"As the estate was mortgaged before the statement (of lien) was recorded, the lien only attaches to the equity of redemption, which Dorman (the contractor with the petitioner) held."

Hoar, J., *Mulrey* v. *Barrow*, 11 *All.* 152, 154.
Francis v. *Sayles*, 101 *Mass.* 435.
Hayes v. *Fessenden*, 106 *Ib.* 231.

The insurable interest of the defendant in error was then limited by the statute to the equity of redemption owned by Flint at the time when the contract for building was made.

II. The defendant in error is restricted by the terms of the policy of insurance to the loss by fire to this limited interest in the premises and cannot recover for the loss to the premises generally. The former is the only loss for which the plaintiff in error agreed to indemnify him in the policy.

The policy provides for insurance "from loss or damage by fire to the *property hereinafter described*, not exceeding the sum specified on each article, viz: five thousand dollars *on his interest as contractor and builder* in frame hotel building known as the Webster House, in Marshfield, Mass." The policy then provides that the company

will pay "all such loss or damage by fire as shall happen to the *property above mentioned.*"

Policy. Record, p. 11.

The "property above mentioned" must be the property referred to in the beginning of the policy as the "property hereinafter described," and then described as "his interest as contractor and builder;" and the loss or damage to be paid is the loss only to such interest. On no other construction can full effect be given to the words in the policy, — "his interest as contractor and builder." The words define what is insured, and confine the indemnity to loss to the insured interest.

The question is one of intention depending upon the language of the policy.

Home Insurance Co. v. *Baltimore W. Co.* 93 *U. S.* 529.
Insurance Company, v. *Thompson*, 95 *Ib.* 547.

That the term "property" as used in the clause of a policy defining what is insured, means the interest of the insured, — see

Locke v. North Am. Ins. Co., 13 *Mass.* 61.
Holbrook v. *Brown*, 2 *Ib.* 280.
Tyler v. *Ætna Ins. Co.*, 12 *Wend.* 507.
Whiton v. *Old Colony Ins. Co.*, 2 *Met.* 1.
Old Colony R. R. Co., v. *Plymouth*, 14 *Gray*, 155.
2 *Abb. Law Dict.* "*Property*," *p.* 337.

"The term 'property' as applied to lands comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory as well as those which are executed."

Marshall, C. J. *Soulard* v. *United States*, 4 *Pet.* 511.
Delassus v. *Same*, 9 *Ib.* 117, 133.
Figg v. *Snook*, 9 *Ind.* 202.

So in an action upon a policy of re-insurance, the word "property" was defined to be simply the interest the plaintiffs, as the insured underwriters, acquired, as such, in the merchandise insured by them. "The phrase 'property hereby assured,' I apprehend, refers to the interest of the insured acquired by them as underwriters upon the original policy in respect to the merchandise. The damage to that property by fire was the measure of their liability upon the primitive policy, and of the defendants upon the second, within the sum mentioned. That liability did not in strictness give the first insurers

a property in the merchandise insured, but only an interest in its preservation."

Gardner, J., *Mut. Safety Ins. Co.* v. *Hone*, 2 *N. Y.* 235, 239.

So here, had the defendant in error acquired another particular interest in the premises, *e. g.*, as assignee of the mortgage, he could have insured it without being subjected, in case of loss, to a proportionate reduction of the amount to be recovered, under the provision in this policy relating to other insurance "extending to the property hereby insured."

Policy of Insurance. Record, p. 11.
Case supra.
Aetna Ins. Co. v. *Tyler*, 16 *Wend.* 385.
Springfield Ins. Co. v. *Allen*, 43 *N. Y.* 389.

The court erred in refusing to make the distinction between an insurance like this of a special limited interest in the premises, with an agreement to pay only the loss to that interest, and an insurance of the premises generally by one having an insurable interest, with an agreement to pay whatever loss should happen to the premises.

The two contracts are different. In the former the insurer agrees to pay only the loss to the limited interest; in the latter, he promises to pay any loss to the premises. The cases where the insured has been allowed to recover more than his actual interest, (assuming such decisions correct,) are, (1) either cases where the interest insured was not defined and stated in the policy; or (2) cases where, whatever interest may have been stated, the insurer expressly agreed to pay all loss to the premises regardless of insured's interest therein.

So, it was held that a mortgagee of a ship may insure the ship generally, but if he insured only his interest in her, he can recover only the amount of mortgage debt due him, for the debt measures the interest.

Irving v. *Richardson*, 2 *B. and Ad.* 193.

So, where an unpaid vendor insured premises before formal conveyance was made, — which were bought to be immediately torn down, — the Court did not limit the recovery to the value of the building as old material, but allowed full recovery, on the ground that the contract in terms was "not to make good any loss to the plaintiff but any damage to the building." (Lush. J.)

Collingridge v. *Royal Ex. Ass. Co.* 3 *Q. B. D.* 173.

And so a mortgagee may recover the whole amount of his insurance if the loss amounts to so much, although the property remaining after the fire is ample security for the debt,

Foster v. *Equitable Ins. Co.* 2 *Gray*, 216,

because the insurer has contracted to pay any loss by fire to the premises,—and such loss has occurred.

Andes Ins. Co. v. *Fish* was decided upon the ground that the policy bound the insurer "not to pay the assured the damages which shall occur to his *interest in the property*,"—but such as should happen "*to the property*.

Andes Ins. Co. Fish, 71 *Ill.* 620, 625.

The same distinction is recognized in

Ins. Co. v. *Apdegraff*, 21 *Penn. St.* 513.

Carpenter v. *Prov. Wash. Ins. Co.* 16 *Pet.* 495.

May Insurance, § 424.

There is nothing in the cases relied upon by the court below, to show the application of any different distinction.

Johnson v. *Ins. Co.*, 1 *Holmes*, 117.

Fox v. *Ins. Co.*, 52 *Me.* 333.

Ætna F. Ins. Co. v. *Tyler*, 12 *Wend.* 507.

S. C. 16 *Ib.* 386.

In *Strong* v. *Man. Ins. Co.*, (10 *Pick.* 40.) the insurance was by the mortgagor upon the premises without describing his interest. The remark by the court that the value of the plaintiff's interest was immaterial is *obiter dictum*. But the court said that the "plaintiffs' interest is substantially the same as it would have been had the property been free from any incumbrance,"—that the right to redeem might constitute a valuable interest, and that "no evidence was offered to them that it was not,"—implying that such evidence would have been relevant. Supposing in that case the plaintiff instead of being the mortgagor, insuring his mortgaged dwelling-house, had purchased the equity of redemption without assuming any liability to pay the mortgage debt, and had insured simply that equity in a policy in which the insurer agreed to pay only any loss to such equity;—could he have recovered the same amount, after proof that the equity was worthless, as he was allowed to do in the case cited?

The Court below ruled that there was no distinction between the two cases. Yet such distinction is recognized by this Court.

Carpenter v. *Prov. Wash. Ins. Co.* 16 *Pet.* 495.

We submit that this contract of insurance shows an intention to insure a special limited interest, and to pay for loss to that interest. If such interest was worthless, the fire caused no loss to it, and the contingency rendering the insurer liable has not happened. The latter did not contract that the property subject to the lien should continue to exist, but merely that the insured should not suffer loss by reason of its destruction by fire.

The Court below by its rulings failed so to construe the contract, and enforce this intention of the parties. It, in effect, instructed the jury to consider, not *the value of the interest insured*, but the *value of the whole property* regardless of incumbrances.

It prevented the jury from finding the amount of loss to the very thing insured, — that is, "the insured's interest as contractor and builder."

It thus obliged the plaintiff in error to insure the property which was subjected to the lien, and not the lien interest, — the whole property, and not the limited interest of the insured in it. It allowed the latter to contradict the policy under which he claimed, by recovering upon an interest superior to the interest insured, and to deprive the insurer of the benefit of the description of the insured's interest.

III. We further submit that even if the plaintiff in error did not by express contract limit its liability to the loss to the particular lien interest of the defendant in error, still the latter by describing and insuring specifically such interest, is confined in his recovery to the actual loss to such interest.

Where a particular interest is insured *eo nomine*, the insured in case of loss can recover only the loss to that interest.

Graves v. *Boston Mar. Ins. Co.*, 2 *Cranch* 419.
Parks v. *Gen. Int. Ins. Co.*, 5 *Pick.* 34.
Getchell v. *Ætna Ins. Co.*, 14 *All.* 325.
Peoria Ins. Co., v. *Hall*, 12 *Mich.* 202.

The amount of recovery will depend upon the interest intended to be insured, provided it be covered by the policy.

Ins. Co., v. *Thompson*, 95 *U. S.* 547.
Home Ins. Co., v. *Baltimore Warehouse Co.*, 93 *U. S.*, 527.
Ins. Co., v. *Chase*, 5 *Wall.* 509.
Steel v. *Franklin Ins. Co.*, 17 *Pa. St.* 290.
Irving v. *Richardson*, 2 *B. & Ad.* 193.
Ins. Co., v. *Updegraff*, 21 *Penn. St.* 513.

There are authorities sustaining a much broader proposition than the one contended for, and holding that one insured either generally or specially upon property in which he has only a special interest, simply insures the capacity of that property to cover and protect his interest.

So *Flanders* speaking of insurance by mortgagees says, — "It is not the specific property that is insured, but its ***capacity*** to pay the mortgaged debt." (*Insurance p.* 360.)

"When the interest is contingent, as where the title to real estate or a vessel has been absolutely conveyed, but the conveyance is subject to a provision that the surplus above a certain sum realized therefrom shall be paid to him, the extent of the insurable interest is the actual loss that would result from the destruction of the property; — consequently it is incumbent upon the insured to show the value of his interest therein, and unless it appeared that there is some pecuniary value thereto, no recovery can be had. . . . Therefore in all cases the question really is whether the party sustains any pecuniary loss from the destruction of the property and how much. (*Wood Fire Insurance.* § 258.)

And see *Smith v. Ins. Co.*, 17 *Penn. St.* 253, where the court says :— "Notwithstanding the form of the contract, therefore, a mortgagee insures, whether generally or specially, not the ultimate safety of the whole of the property, but only so much of it as may be enough to satisfy his mortgage. It is not the specific property that is insured, but its capacity to pay the mortgage debt.

In effect the security is insured. The fallacy of the argument on part of the plaintiff below, is in assuming that the words in the policy 'to pay, make good, and satisfy all such damages as may happen by fire to the ***property***' bind the insurer to pay in every case to the extent of an outside price for which it might be sold, unincumbered, in the market. What is the property insured? Not the thing independent of ownership: for if the law were otherwise, a policy might be, to some extent, a wagering one. The beneficial interest in it is insured, and only to the value of it can the owner recover for a loss of it, because the contract of insurance is strictly a contract of indemnity.". (*Case supra, p.* 260.)

And see *Harris* v. *Gaspee Ins. Co.* 9 *R. I.* 207. "The contingency having arrived upon which the loss was payable, it must be paid according to the ***status*** of the interest at the time when the con-

tingency happened. To indemnify the mortgagee for all loss to the property, means to the amount of his interest."

May Insurance, § 424.

Delaware Ins. Co. v. *Quaker City Ins. Co.* 3 *Grant Penn. Cases*, 71.

Com. Ins. Co. v. *Mut. Ins. Co.* 35 *Penn. St.* 475.

So it is settled, that under a policy upon a vessel issued to the owner, the amount of bottomry upon her is to be deducted in estimating the loss payable under the policy.

Watson v. *Ins. Co. of N. America*, 3 *Wash. C. C.* 1.

Smith v. *Williams*, 2 *Caines Cas.* 110.

Read v. *Mut. Safety Ins. Co.* 3 *Sandf.* 54.

Glover v. *Black*, 3 *Burr.* 1394.

"The borrower on bottomy and respondentia has no insurable interest in the property pledged, except in as far as the value of such property exceeds the amount for which it is pledged. If pledged to its full value, it is obvious that the borrower can have no insurable interest in its safety;—for in such case if the property arrives it goes to satisfy the debt;—if lost by the risks within the hypothecation, the borrower is discharged.

Arnold Ins. p. 108.

"The lender can insure only the amount of the sum lent, and the borrower has only an insurable interest in the ship or goods to the amount of the surplus value above the sum lent."

Marshall Ins., Part I., ch. 4, (*5th Eng. ed.*) *p.* 82.

King v. *State Mut. Ins. Co.* (7 *Cush.* 1,) is cited as against our position. Even on the point decided, it is not generally accepted and followed.

Carpenter v. *Prov. Wash. Ins. Co.* 16 *Pet.* 495.

Smith v. *Ins. Co.* 17 *Penn. St.* 253.

The decision is based upon the fact that the mortgagee insured his interest "without particularly describing the nature of his interest," and was allowed to recover "the amount of the loss" without assignment of the mortgage to the insurer. So far as the case bears upon the case at bar, the language of the court is *obiter dictum*, while the reasoning of the court sustains our position. The plaintiff, a mortgagee, "made the insurance in his own name and for his own benefit, *not describing his interest as that of mortgagee*, and paid the premium out of his own funds," and the court held that the insurance was a personal contract with one having a pro-

prietary interest in the property, guaranteeing to him that the property in which he had such interest should not be destroyed or diminished by the causes insured against.

The court reasoned that the Company estimated the chances of loss to the buildings, and fixed the premium at a sufficient sum to be complete consideration for the insurance to the buildings, and when the buildings were destroyed, the insured having paid this premium, was entitled to the consideration promised,— full payment of any loss to the property.

In the case at bar, the defendant in error insured "his interest as contractor and builder," thus clearly notifying the company that his interest was a mechanic's lien merely, and not a proprietary interest.

Had he insured the property generally, or even his interest in the property without disclosing its nature, the company would have estimated the chance of loss to the property, and fixed the premium accordingly;— but when he insured only a lien interest in the property, the company estimated only the chance of injury to that lien, and received a premium for assuming that much more limited risk, and it cannot be said that the contract is to pay for loss to the property, or to proprietary interest, irrespective of loss to such lien interest. To oblige the insurer to pay such loss is to impose on him a burden he did not assume, and for which he received no adequate consideration.

IV. We submit that whatever may be the particular description of the property insured, and of the liability undertaken, the fundamental principle governing a contract of insurance, as a contract of indemnity, forbids a recovery by the insured of more than the amount of the actual loss sustained.

It should be observed that the defendant in error does not claim to recover as trustee or agent, for others. The only interest he claims to have insured was his own, as "contractor and builder."

This fact distinguishes the case from those where holders of special interests in property are allowed to insure the whole property, and recover its whole value, to be held for those whose interests were intended to be covered.

Ins. Co. v. *Baltimore Ins. Co.* 93 *U. S.* 527.
Ins. Co. v. *Chase*, 5 *Wall*, 509.
Ins. Co. v. *Thompson*, 95 *U. S.* 547
Waters v. *Ins. Co.* 5 *El. & Bl.* 870.
Railway Co. v. *Glyn*, 1 *El. & El.* 652.

Ins. Co. v. *Updegraff*, 21 *Penn. st.* 513.
Shaw v. *Ins. Co.* 49 *Mo.* 578.
Shaw v. *Walter*, 13 *Mass.* 267.

And from cases of insurance by mortgagors of whole estate—

Carpenter v. *Prov. Wash. Ins. Co.* 16 *Pet.* 495.
Gordon v. *Ins. Co.* 2 *Pick.* 249.
Strong v. *Man. Ins. Co.* 10 *Ib* 40.
Waring v. *Loder.* 53 *N. Y.* 581.

where they recover full value of insured property, because liable to pay the mortgage debts.

This is simply a case where a party has, and insures, a particular interest for his own benefit, which interest at the time of loss was actually worth little or nothing, and to pay him more than the value of such interest is to give him more than full indemnity for his loss.

"An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is in effect a contract of indemnity, with an owner or other person, having an interest in the preservation of the buildings, as mortgagee, tenant, or otherwise, to indemnify him against any loss which he may sustain, in case they are destroyed or damaged by fire. . . . The contract was to indemnify the assured; if he has sustained no damage, the contract is not broken."

Shaw, C. J. *Wilson* v. *Hill*, 3 *Met.* 66, 68.

The same principle is recognized in this court.

"It is to be observed that whether insurance be against fire, or marine loss, or loss of life, it is neither the property or life that is insured. Nor does the contract propose or intend to say that there shall be no destruction of the property or loss of life. In point of fact, the obligation of the insurer is designed to come into operation after the loss, either of life or property, has occurred, and to give compensation to some one interested in the life or the property, for the loss of that life or injury to that property. *In regard to property this compensation is intended by the fundamental principles of insurance to bear a direct relation to the moneyed value of the interest which the party insured had in the property.* . . . . But it often occurs that the interest of the party insured is not that of full ownership. His interest may be that of a trustee, executor, or some

other representative character, in which case the recovery will be in accordance with the nature of the contract."

Miller, J., *Ins. Co.* v. *Thompson.* 95 *U. S.* 549.

and was early recognized by Lord Mansfield.

"The plaintiffs' demand is for an indemnity. His action then must be founded upon the nature of his damnification, as it really is at the time the action is brought. . . . Whatever undoes the damnification in whole or in part must operate upon the indemnity in the same degree. It is a contradiction in terms to bring an action for indemnity, when upon the whole event no damage has been sustained. This reason is so much founded in sense and the nature of the thing, that the common law of England adopts it. . . . . The insurer by the marine law, ought never to pay less upon a contract of indemnity than the value of the loss, and the insured ought never to gain more."

Hamilton v. *Mendes*, 2 *Burr*, 1210, 1214.
Flaganan v. *Camden Ins. Co.*, 1 *Dutch.* 506.

"Except in cases where the policy is valued, the right of the assured to a recovery upon his policy is only commensurate with his *actual loss* within the limits of the sum insured."

Wood, Fire Ins. § 445.
May, Insurance, § 2.
Angell, Insurance, 56.
Marshall, Insurance, ch. 4. § 1. (*5th Eng. ed.*) *p.* 65.
Arnould, Insurance, pp. 1–7.

The insured is therefore always required to prove the exact extent of his loss.

Sedgwick, Damages, (*6th ed.*) *p.* 306.
Chapman v. Pole, 22 *L. T. N. S.* 306.

If he parts with his interest before loss he can recover nothing, because he is not damnified, by the loss.

McLaren v. *Hartford Ins. Co.*, 5 *N. Y.* 151
Hidden v. *Ins. Co.*, 2 *Cliff.* 266.
Hoxie v. *Providence Ins. Co.*, 6 *R. I.* 517.
Grosvenor v. *Ins. Co.*, 17 *N. Y.* 392.

And if he has parted with a portion of his interest he can recover only for the loss to the remaining portion; "The jury are to determine what interest the plaintiff retained and the value of it."

Stetson v. *Ins. Co.*, 4 *Mass.* 330, 336.
Manly v. *Ins. Co.*, 1 *Lansing*, 20.

So, "where assured has contracted to sell property, and has given possession under contract, and received part of the purchase money, although the title has not passed, he cannot recover beyond the unpaid purchase money."

Wood, Fire Ins., § 457.

Shotwell v. *Jefferson Ins. Co.*, 5 *Bos.* (*N. Y.*) 247.

So, "a mortgagee insuring his own interest, recovers according to his interest at the time when he commences his suit, or perhaps more accurately at the time of the loss."

May Insurance, § 424.

Sussex Mut. Ins. Co., v. *Woodruff*, 26 *N. J.* 541.

So a lessee insuring the leased premises can recover only the fair value of the unexpired lease-hold, that is, "what a stranger would give for the unexpired lease when the fire occurred."

Niblo v. *Ins. Co.* 1 *Sandf.* (*N. Y.*) 551.

And a person having insurance upon distilled liquors, destroyed before payment of tax due upon them, can recover only the value less the tax; because, although there was a lien for the tax, "the destruction left the owner without any personal liability to the government for such tax."

Security Ins. Co., v. *Farrell*, (*Sup. Ct. Ill.*) 2 *Ins. L. J.* 302. and see *Ins. Co.* v. *Thompson*, 95 *U. S.* 547.

So, in cases of re-insurance, the original insurer can recover of the re-insurer only what the former actually paid for settlement of the loss, and not what he became liable to pay upon the destruction of insured premises,—for "the actual loss sustained by the assured is the measure of indemnity."

Ill. Mut. Ins. Co. v. *Andes Ins. Co.*, 67 *Ill.* 362.

We submit that it makes no difference what diminishes the value of insured's interest,— whether a sale of part, loss by depreciation or decay, or prior incumbrances;— the contract being one of indemnity, the insured can recover only an amount sufficient to indemnify him.

Under the rulings of the court below, the defendant in error recovered more than such indemnity.

If the insured could recover, irrespective of the actual value of his interest, the whole amount of insurance to the amount of his debt and value of the premises,— he might have taken an assignment of the mortgage, and insuring his interest as mortgagee, have recovered again full insurance. Then, supposing there had been a

second mortgage, and that he was surety upon the mortgage note, he could again have insured his interest and recovered full insurance. Each interest would be distinct so that there would have been no double insurance. A burden would thus have been imposed upon the insurer, not accepted in the contract of insurance, and against public policy. The only safe, equitable, and legal principle is to restrict recovery to the actual value of the particular interest insured, and this the court below declined to do.

II.

The seventh, eighth, tenth, and eleventh assignments of error may be considered together as presenting the question,— Whether the dismissal of the suit to enforce his mechanic's lien, and the consequent discharge of the lien, by defendant in error, after the fire, was such an act on his part as to prevent his recovering in this action.

We submit it had such effect, and that the court erred in declining so to instruct the jury.

(1) The lien was purely statutory; its continuance depended purely upon strict compliance with the provisions of the statute. The claimant must file a statement of claim within thirty days after the completion of the work. (*Gen. St. Mass. ch.* 150, §5, *post. p.* 25) It was also necessary to file a petition to the appropriate court for the enforcement of the lien within ninety days after such completion, and otherwise "the lien shall be dissolved." (*Gen. St. Mass. ch.* 150, §7, *post. p.* 25)

It was also essential to the continuance of the lien that the defendant in error should with diligence prosecute his petition, and obtain a judgment of the court sustaining the validity of the lien, and fixing its extent and value. (*Gen. St. Mass. ch.* 150, §§17–19, *post. p.* 26)

"Where suit must be brought within a certain time, which is done, the existence of the lien, after the time of bringing it has expired, depends exclusively upon the pendency of the suit brought for its enforcement. If that suit should be dismissed for want of prosecution, or for any other cause, the lien would be as effectually lost and defeated, as it would have been, if no suit had been brought within the time allowed by law." (*Phillip's Mechanic's Lien* § 269.)

The lien was merely an inchoate claim for an undetermined amount upon the estate, — depending for its validity and extent

upon a judicial determination in the court provided by the statute, (Gen. St. ch. 150, X , *post* p. 25) No other means is recognized for determining its legal existence or amount.

"When by statute a new right is given, and a specific remedy provided, or a new power and also the means of executing it are provided by statute, the power can be executed, and the right vindicated, in no other way than that prescribed by the statute."

Sedgwick, Con. of Statutes, p. 343.
Hinsdale v. *Larned*, 16 *Mass.* 65.
Gedney v. *Tewksbury*, 3 *Ib.* 307.
McCormack v. *Terra Haute, R. I.*, 9 *Ind.* 283.
St. Pancas v. *Battenbury*, 2 *C. B.* (*N. S.*) 471.

As then this statutory right and remedy were voluntarily discharged before such determination, the statutory means of making such determination was forever gone, and the lien must be regarded as void *ab initio*. It is to be regarded as having never existed, and the defendant in error, as having had no insurable interest in the property.

Sullivan v. *Brewster*, (*E. D. Smith*, (*N. Y.*) 681.

That it is necessary for the builder to procure a judicial determination in a suit to enforce the lien, in order to prove an insurable interest, see,

Stout v. *Fire Ins. Co.*, 12 *Iowa*, 371.

Where the court released the insured upon a mechanic's lien from the warranty to commence suit upon the policy within a year from the loss, on the ground that he was first obliged to establish his lien by judicial determination, and could not do so within the year.

"The best evidence, indeed, as we regard it, the only legitimate evidence, to prove the value of the interest . . . . . is the established lien of the mechanic, as adjudicated by the court against the owner of the building. In this case one David was the owner, and Langhurst the mechanic and contractor. While he had a lien for his work and material furnished, the court had to determine the value of such work and material. The mechanic had no more right to place a value on the same, than he for whom the work was done. The lien must be established by the judgment of the court, and the amount of such lien was the interest insured. The judgment, as before stated, is the best and only evidence to prove that value." (*Baldwin, J., case supra, p.* 386.)

Langhurst v. *Star Ins. Co.*, 19 *Iowa*. 364.

Supposing the lien had been prosecuted and tried in court, and the court had declared it invalid, — would the defendant in error have had an insurable interest, by reason of it, at the time of the loss? Such judicial decision would have related back, and made the lien void *ab initio*. The plaintiff in error was entitled to some judicial decision, which might limit, and certainly would fix, the extent of liability under the contract of insurance. As the plaintiff in error knew from the description of interest made by the insured, that such interest was a mechanic's lien, it could assume, in making the contract and fixing the terms, that the insured, before claiming for loss to that interest, would obtain under the statute a judicial decision as to its validity and amount.

It was for the Superior State Court, and not the United States Circuit Court, to say whether at the time of the loss, the defendant in error had a valid lien, and so an insurable interest.

(2.) Not only did the defendant in error fail to prosecute his suit to judgment, but he voluntarily consented in court that such suit might be dismissed. (*Record, p.* 18.) This was a voluntary non-suit by agreement made when any and all other proceedings to enforce the lien were barred by the statute. It was then a voluntary renunciation of his interest and claim. It was, in effect, a judgment of *retraxit*, and by it the defendant in error "forever loses his action."

3 *Bl. Com.* 296.

He thereby admitted, as by judgment in court, the invalidity of the lien, and the non-existence of the insurable interest.

(3) In any event, such non-suit and surrender of the lien on the part of the defendant in error was an admission as to its value or want of value, and as such, should have been considered by the jury in estimating such value. The court erred, therefore, in instructing them that it was immaterial whether defendant in error did or not acts after the fire, which dissolved the lien.

Assignment of Error, 10, *ante p.*

III.

The ninth assignment of error is the refusal of the court to rule that the voluntary release by defendant in error of his lien and the suit to enforce it, was such an interference with, or action upon,

the insurer's right of subrogation or otherwise, as to prevent a recovery by the defendant in error.

We submit that upon payment of the loss, we should have been entitled by subrogation to the lien interest held by defendant in error in the premises destroyed. It may be presumed that the insurance was made, and premium fixed, with this right of subrogation in view. The insurer could infer such a right from the statement of the interest insured.

That upon payment of the loss, the plaintiff in error was entitled to an assignment of the insured interest, — see,

Carpenter v. *Prov. Wash. Ins. Co.*, 16 *Pet.* 495.
Sussex Co. Ins. Co. v. *Woodruff*, 2 *Dutch.* 541.
Aetna Ins. Co. v. *Tyler*, 16 *Wend.* 385.
Kip v. *Mut. Ins. Co.* 4 *Ed. Ch.* (*N.Y.*) 86.
Harris v. Gaspee Ins. Co. 9 *R. I.* 207.

Upon payment of loss, — "the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances; — for the payment of the insurance by the underwriters does not, in such a case, discharge the mortgagor from the debt, but only changes the creditor."

Story, J. *Carpenter* v. *Wash. Prov. Ins. Co. supra*, p. 501.

The defendant in error deprived the plaintiff in error of this right by discharging the lien before loss was paid, or judicially determined. As the right accrued only upon the payment of the loss, it was the duty of the insured to keep his lien interest alive until such payment. The plaintiff in error was not obliged to, and could not legally, demand subrogation, until the loss was paid, and the loss need not be paid until the liability of the company was judicially established. It was entitled to defend the suit on other grounds, and then, when found liable for the loss, demand and receive subrogation. The defence was that the insured's interest was worthless; if it had prevailed, then there was no liability upon the company. But if the instructions of the court, under which the jury found such interest was worth $5000, are correct, then we claim to be subrogated to that interest; — the defendant in error has intentionally released and discharged such interest, and so put it out of his power to give us, what the law allows us, a right by subrogation. He has not performed his part of the agreement of insurance, or the

duty arising out of the relations between insurer and insured, and therefore is not in a position to recover the loss claimed under such agreement of insurance. The court erred in refusing so to instruct the jury.

CHAS. THEO. RUSSELL,
CHAS. THEO. RUSSELL, JR.
Counsel for Plaintiff in error.

STATUTES REFERRED TO AND RELIED UPON.

(MASSACHUSETTS GENERAL STATUTES, Ch. 140.)

FORECLOSURE AND REDEMPTION OF MORTGAGES.

SECT. 1. After the breach of condition of a mortgage of real estate, the mortgagee may recover possession of the mortgaged premises by action in the manner hereinafter provided; or he may make an open and peaceable entry thereon, if not opposed by the mortgagor or other person claiming the premises; and such possession, obtained in either mode, continued peaceably for three years, shall forever foreclose the right of redemption.

SECT. 2. When an entry for breach of the condition is made without a judgment, a memorandum or certificate thereof shall be made on the mortgage deed and signed by the mortgagor, or the person claiming under him, or a certificate of two competent witnesses to prove the entry shall be made, and sworn to before a Justice of the Peace; — and the same shall within thirty days after the entry be recorded in the registry of deeds for the county or district where the land lies, with a note of reference from each record to the other, if the mortgage is recorded in the same registry. No such entry shall be effectual for the purposes mentioned in the preceding section, unless a certificate or a deposition in proof thereof is thus made and recorded.

SECT. 7. An entry for breach of the condition may be made, and an action for possession may be brought, by an assignee of the mortgagee, whether the assignment is by deed or by operation of law, and the action shall be conducted in like manner as if brought by the original mortgagee.

SECT. 13. When the condition of a mortgage has been broken, the mortgagor, or any person lawfully claiming or holding under him, may redeem the same, unless the mortgagee, or some person lawfully holding or claiming under him, has obtained possession of the premises for the breach of the condition, and has continued that possession for three years.

(MASSACHUSETTS GENERAL STATUTES, Ch 150.)

LIEN ON BUILDINGS AND LAND.

SECT. 1. Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used, in the erection, alteration, or repair, of any building or structure upon real estate, by virtue of an agreement with, or by consent of, the owner of such building or structure, or any person having authority from, or rightfully acting for, such owner in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt so due to him, and the costs which may arise in enforcing such lien under this chapter; except as is provided in the following sections.

SECT. 2. Such lien for materials furnished shall not attach unless the person furnishing the same, before so doing, gives notice to the owner of the property to be effected by the lien, if such owner is not the purchaser, that he intends to claim such lien.

SECT. 3. Such lien shall not avail or be of force against any mortgage, actually existing and duly recorded, prior to the date of the contract under which the lien is claimed.

SECT. 4. The owner of any such building or structure in process of erection or being altered or repaired, other than the party by whom or in whose behalf a contract for labor and material has been made, may prevent the attaching of any lien for labor thereon not at the time performed, or materials not then furnished, by giving notice in writing to the person performing or furnishing such labor or furnishing such materials, that he will not be responsible therefor.

SECT. 5. Such lien shall be dissolved unless the person desiring to avail himself thereof, within thirty days after he ceases to labor on, or furnish labor or materials for, such building or structure, files in the office of the clerk of the city or town in which the same is situated, a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien, sufficiently accurate for identification, with the name of the owner or owners of the property, if known; which certificate shall be subscribed and sworn to by the person claiming the lien, or by some one in his behalf, and shall be recorded in a book kept for the purpose by the clerk of such city or town, who shall be entitled to the same fees therefor as for recording mortgages of equal length.

SECT. 7. Unless a suit for enforcing the lien is commenced within ninety days after the person desiring to avail himself thereof ceases to labor on, or furnish labor or materials for such building or structure, the lien shall be dissolved.

SECT. 8. The lien may be enforced by petition to the superior court in the county where the building or structure is situated. The petition may be filed in term, or in the clerk's office in vacation, and the date of the filing shall be deemed the commencement of the suit.

SECT. 10. The petition may be inserted in a writ of original summons and be served, returned, and entered as other civil cases.

SECT. 11. Whether filed as a petition or inserted in such summons, the petition shall contain a brief statement of the contract on which it is founded and of the amount due thereon, with a description of the premises subject to the lien, and all other material facts and circumstances; —and shall pray that the premises may be sold, and the proceeds of the sale be applied to the discharge of the demand.

SECT. 17. At the time assigned for the hearing, or within such further time as the court allows for that purpose, every creditor having a lien of the kind before mentioned upon the same property, may appear and prove his claim, and the owner and each of the creditors may contest the several claims of every other creditor, and the court shall hear and determine them in a summary manner, either with or without a jury, as the case may require.

SECT. 19. The court shall ascertain and determine the amount due to each creditor, who has a lien of the kind before mentioned upon the property in question; and every such claim due absolutely and without any condition, although not then payable, shall be allowed, with a rebate of interest to the time when it would become payable.

SECT. 20. When the owner fails to perform his part of the contract, and by reason thereof the other party, without his own default, is prevented from completely performing his part, he shall be entitled to a reasonable compensation for as much as he has performed, in proportion to the price stipulated for the whole, and the court shall adjust his claim accordingly.

SECT. 21. If the lien is established in favor of any of the creditors whose claims are presented, the court shall order a sale of the property to be made by any officer authorized to serve civil process between the same parties.

SECT. 22. If part of the property can be separated from the residue, and sold without damage to the whole, and if the value thereof is sufficient to satisfy all debts proved in the case, the court may order a sale of that part, if it appears to be most for the interest of all parties concerned.

SECT. 23. The officer who makes the sale shall give notice of the time and place in the manner prescribed in relation to the sale on execution of a right of redeeming mortgaged lands, unless the court orders a different notice to be given.

SECT. 24. Any interest in real estate so sold may be redeemed in the manner provided in the case of a sale on execution of the right of redeeming mortgaged lands.

SECT. 28. If the interest of the owner in the building, structure or land, is under attachment, at the time of filing and recording the statement of the account, the attaching creditor shall be preferred to the extent of the value of the buildings and land as they were when the statement was recorded; and the court shall ascertain by a jury or otherwise, as the case may require, what proportion of the proceeds of the sale shall be held subject to the attachment, as derived from the value of the property when the statement was recorded.

SECT. 29. If the attaching creditor recovers judgment, he shall be entitled to receive on his execution the proportion of the proceeds held subject to his attachment, or as much thereof as may be necessary to satisfy his execution, and the residue of the proceeds shall be applied in the same manner as if there had been no such attachment.

SECT. 30. If the interest of the owner of the property is attached after the recording of the statement, the proceeds, after discharging all prior liens and claims, shall be applied to satisfy the execution of such attaching creditor, in like manner as is provided in chapter 133, in the case of two or more successive attachments or seizures in execution of a right of redemption.

SECT. 31. If an attachment is made after the recording of such statement, and if after the attachment another like statement is recorded, the creditor in the latter statement shall be entitled to be paid only out of the residue of the proceeds remaining after paying all that is due on the demands, a statement of which is recorded before the attachment, and satisfying the attaching creditor.

SECT. 33. If the person for whom the work is done, or materials are furnished, has an estate for life, or any other estate less than a fee-simple in the land, or if the property at the time of recording the statement is mortgaged, or under any other incumbrance, the lien before provided for shall bind his whole interest and estate therein, in like manner as a mortgage would have done; and the creditor may cause the right of redemption, or whatever other right or estate the owner had in the property, to be sold and applied to the discharge of his debt according to the provisions of this chapter.

SECT. 34. If the person indebted dies or conveys away his estate or interest, before the commencement of a suit on the contract, the suit may be commenced and prosecuted against his heirs, or whoever holds the estate or interest which he had in the premises at the time the labor or materials were performed or furnished; or if a suit is commenced in his life time, it may be prosecuted against his executors, administrators, heirs, or assigns, in like manner as if the estate or interest had been mortgaged to secure the debt.

Acts 1871. Chap. 78.

The one hundred and fiftieth chapter of the General Statutes is hereby amended as follows: by striking out from said chapter the fourteenth section, and inserting instead thereof as section fourteen of said chapter the following: The court in which the petition is entered, or the clerk thereof in vacation, shall order notice to be given to the owner of the building or structure, that he may appear and answer thereto at a certain day in the same term or at the next term, by serving him with an attested copy of the petition with the order of the court or clerk thereon, fourteen days at least before the time assigned for the hearing; and the court, or the clerk thereof in vacation, shall also order notice of the filing of the petition to be given to the debtor and to all other creditors who have a lien of the same kind upon the same estate, by serving them with a copy of the last-mentioned order in like manner. In case the petition is entered in a municipal or police court, or before a justice of the peace, the day for such appearance and answer shall be fixed at not more than sixty days from the day of such entry.—*March 3, 1871.*



Supreme Court of the United States.

THE ROYAL INSURANCE COMPANY OF LIVERPOOL, ENGLAND, PLAINTIFF IN ERROR,

v.

WILLIAM B. STINSON, DEFENDANT IN ERROR.

BRIEF OF ROBERT D. SMITH,

OF COUNSEL FOR DEFENDANT IN ERROR.

STATEMENT.

Action of contract upon a policy of insurance, whereby the Royal Insurance Company (the plaintiff in error) recites that it has received "$20 from William B. Stinson [the defendant in error] for insuring from loss or damage by fire the property hereinafter described, not exceeding the sum specified on each article, viz., $5,000 on his interest as contractor and builder in a frame hotel building known as the Webster House, in Marshfield," in the County of Plymouth, and covenants "to pay or make good all such loss or damage by fire as shall happen to the property above mentioned" from July 13, 1875, to September 13, 1875 (Record, p. 11, Exh. C). The building was burned September 8, 1875.

The original action, brought in the State court, was removed by the insurance company to the Circuit Court of the United States, and, being there tried, resulted in a verdict of $5,344 for the assured. Certain instructions and rulings were given which are the subject of this bill of exceptions and writ of error.

There is no complaint in this case that the interest of the assured was not truly described or his loss truly stated (Record, p. 23, G; Record, p. 9, cl. 4). It becomes

material to inquire what this interest was at the time of insurance and at the time of loss.

In 1873, one Allen (Record, page 9, Exh. B,) conveyed the piece of land on which the building was erected to Horace P. Flint for the consideration, expressed in the deed, of $17,000, to secure which, upon the same day, Flint mortgaged the same back to said Allen (Record, page 14, Exh. D).

Upon the whole land — 170 acres, more or less, — rested this mortgage for $17,000. What was the consideration of said mortgage, or how much was actually due thereon, or whether the lien was acquired with the consent of the mortgagee so as to affect his mortgage (see *Perkins* v. *Davis*, 120 Mass. 408; *Smith* v. *Norris*, Ib. 58; *Hilton* v. *Merril*, 106 Mass. 528), was not discussed at the bar, as the presiding judge ruled these questions to be immaterial, provided the property destroyed was worth the amount insured thereon; — that is to say, $8,000, as Stinson had $3,000 insured by another policy upon the same interest (Record, p. 23).

The mortgage contained an agreement of the mortgagee "to release from the effects of the mortgage, at any time after proper notice and before the maturity of the same, and pending no breach of the conditions herein by said Flint, the grantor (mortgagor), his heirs or assigns, certain portions or lots of land named herein, according to a plan to be made, on receipt of not less than $500 for each release on account of the mortgage notes, and to be endorsed thereon, said land so released to be at the rate of not less than $300 per acre, and according to a plan to be made satisfactory to said Allen, and to be recorded by the grantor with Plymouth County Deeds."

It appears that on April 6, 1874, Stinson agreed with Flint to build a hotel building; the contract price was $26,000 (Record, pp. 8, 9), to be paid by instalments as the work progressed; the costs of materials and labor put into the structure up to the time of the loss was about $25,000 (Record, p. 23). The sum due and unpaid for services of the builder was about $19,000, for which Stinson had a lien (Record, p. 23).

The payments being behindhand, Stinson, within thirty days after he ceased to labor on and to furnish materials for said hotel building, filed in the office of the clerk of said town of Marshfield, a statement of the amount due him, and a description of the property to be covered by his lien; and on the 22d day of September, 1874 (Record, p. 18, Exh. F), filed his petition to enforce said lien in the Superior Court of the Commonwealth of Massachusetts for the County of Plymouth, alleging that Flint had failed to perform his part of the contract, and by reason thereof, and without any default on the part of Stinson, Stinson was prevented from performing his part of the contract (Record, p. 19). All this is pursuant to chapter 150 of the General Statutes of Massachusetts. (See appendix to this brief.)

It seems that Stinson in due time filed a proper statement of his lien and began suit thereon, and that in 1876, long after the fire, said suit was entered Neither Party.

Under the instructions given, the jury must have found:

First. That the assured had a valid and subsisting lien which could have been enforced, both at the date of the policy and the time of the loss (as in *Hancox* v. *Fishing Insurance Company*, 3 Sumn. 142).

See *Hooper* v. *Robinson*, 98 U. S. 528.

Second. That this lien claim was for a sum equal, at least, to the amount of all his insurance.

Third. That the "value of the building destroyed equalled or exceeded the whole amount insured in all the assured's policies thereon."

The Court also ruled that "if a party has a valid and subsisting second security for a given amount, and he enters into a contract of indemnity against the destruction of that security, and a loss by fire occurs, both parties having knowledge of the state of the property, that such insurance would cover the second security, although by the subsequent course of events the older and prior security might have swept away the value of the second; and that if the jury found in this case that this plaintiff had a valid claim for a given amount, subsisting at the time of the loss, and which he had done everything that was required to enforce up to the time of the loss," . . . . this would be an insurable interest in that property, "whether by any course of events that property might have become more or less valuable, and the value of that interest might have been by subsequent events more or less affected."

POINTS AND AUTHORITIES.

The defendant in error contends in brief:

(1) That as lienor he had, at the time of the insurance and at the time of the loss, a vested interest, a *jus in re*, which was coextensive with and enforceable against the interest of Flint, the mortgagor and owner of the equity. That by enforcing his lien against Flint's interest, he could have acquired the same; and, therefore, if Flint could insure and recover to the full value of the property covered, Stinson can do this to the amount of his lien claim. This is settled by the decisions that a mortgagor may insure and recover the full value of the property.

Carpenter v. *Prov. Wash. Ins. Co.*, 16 Pet. 501.

(2) That Stinson, the lienor, is not cut off from such recovery by the form of words used in the policy, or

(3) By the fact that, after the loss, his lien suit has been entered Neither Party.

It may be convenient to discuss the questions raised in this order:

(1) The interest of a lienor under the General Statutes of Massachusetts, ch. 150 (see appendix to this brief), and how far it is an insurable one.

(2) The extent to which such a lienor may recover, although there be underlying mortgages upon the property.

(3) Whether the right or extent of recovery is affected by the fact that the lienor did not prosecute his petition to final judgment, and connected with this.

(4) As to subrogation, of the insurance company to the rights of the assured, and to his lien on the property.

I.

The first and second questions run into each other.

The statutes of Massachusetts (Gen. Stats., ch. 150) governing mechanics' liens, so far as material to the issue, are contained in appendix to this brief (p. 22). This right of the mechanic is a favored equitable right.

Foster v. *Slone*, 20 Pick. 543.
In re Coulter, 5 Bk. Reg. 65.

It amounts to a *jus in re*, like a mortgage. (See § 33.)

Dunklee v. *Crane*, 103 Mass. 472.

This lien is created by the statute, and dates from the time when the contract to furnish labor and materials is made.

Hulsman v. *Whitman*, 109 Mass. 411.
Gale v. *Blaikie*, 126 Mass. 274.

The provisions relating to the filing of a statement in town clerk's office, and the filing and prosecution of a petition to enforce the lien, are all in the nature of conditions subsequent, merely.

In re Coulter, 5 Bk. Reg. 64.

But the lien arises upon the making of the contract and the furnishing of labor and material, and is only dissolved by a failure to comply with certain conditions. Consequently, if the insurance should be made and the loss happen before the work was absolutely finished, and before the time for filing the statement of claim of lien had arrived, the interest of the lienor would be sufficient.

Franklin Insurance Co. v. *Coates*, 14 Md. 285.

The interest of such a lienor is insurable. "Every lienholder may insure to the extent of his own interest in that to which such interest relates."

Hooper v. *Robinson*, 98 U. S. 538.
May on Ins., § 93, p. 88.
Franklin F. Ins. Co. v. *Coates*, 14 Md. 285.
Longhurst v. *Star Ins. Co.* 19 Iowa, 364.
Carter v. *Humboldt F. Ins. Co.*, 12 Iowa, 287.
Stout v. *City F. Ins. Co.*, 12 Iowa, 371.
See *Brooks* v. *Rw. Co.*, 101 U. S. 443, on liens in Iowa.
Insurance Co. v. *Baring*, 20 Wal. 159, as to lien on vessel.
Bank of So. Car. v. *Bicknell*, 1 Clif. 85, as to lien of factor.
See *Protection Ins. Co.* v. *Hall*, 15 B. Monr. 411.

The contract in this case between the assured and underwriter "is not" (to use the language of SHAW, C.J.), "strictly speaking, an insurance of the property itself; nor is it a contract to insure the debt due the lienor; but it is a personal contract, with a person having a proprietary interest in property, that the property shall sustain no loss by fire within the time expressed in the policy."

It is a fair contract in which "the premium paid and the sum to be received are intended to be, and in theory of law are, precisely equivalent."

King v. *State M. F. Ins. Co.*, 7 Cush. 4, 9, 10.

It is a contract against loss of the thing to the person with whom it is made.

Lucena v. *Crawford*, 2 Bos. & Pul. N. R. 269.
Wilson v. *Hill*, 5 Met. 68.

Mere wager policies are void. But it is only necessary that a person insured should have an interest in the con-

tinued existence of the thing, to enable him to recover its value to the extent of his interest.

Fox v. *Phœnix Ins. Co.*, 52 Maine, 333.

Some of the definitions of an insurable interest, to be found in the text books, are as follows: —

3 Kent. Com., page * 276: "The interest need not be a property in the subject. It does not necessarily imply a right to or property in the subject insured. It may consist in having some relation to, or concern in, the subject of the insurance, and which relation or concern may be so affected by the peril as to produce damage." "When a person is so circumstanced he is interested in the safety of the thing, for he receives a benefit from its existence, and a prejudice from its destruction; and that interest is, in view of the English law, a lawful subject of insurance."

See *Cumberland Bone Co.* v. *Andes Ins. Co.*, 64 Me. 470; quoting, also, 1 Arn. Ins. 229.

Phil. on Insurance, § 174: "That the peril or event insured against must be such, that its happening might bring upon the insured a pecuniary loss. It is sufficient that it might bring a loss, and by no means necessary that it should certainly have that consequence, were it to happen."

Flanders on Fire Ins. 377: "If the insured has a limited special interest, or if he would suffer any disadvantage by the destruction of the premises, or any reasonable expectation of profit would be thereby defeated, he may protect or indemnify himself by insurance."

In *Wilson* v. *Jones*, L. R. 2 Ex. 150, BLACKBURN, J., says: "I apprehend that the distinction between a wager

and a policy is this: a policy is, strictly speaking, a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to; and I know no better definition of an interest in an event than that indicated by LAWRENCE, J., in *Barclay* v. *Cousins*, 2 East. 544, and more fully stated by him in *Lucena* v. *Crawford*, 2 B. & P. N. R. p. 301, that if the event happens the party will gain an advantage, if it is frustrated he will suffer a loss."

In *Ins. Co.* v. *Chase*, 5 Wall. 513, DAVIS, J., says: "The courts of this country, as well as England, are well disposed to maintain policies — where it is clear that the party assured had an interest which would be injured in the event that the peril insured against should happen." See cases cited in opinion: and *Ins. Co.'s* v. *Thompson*, 95 U. S. 547; *Phœnix I. Co.* v. *Hamblin*, 14 Wal. 507; *Home Ins. Co.* v. *Baltimore W. H. Co.* 93 U. S. 527.

As to the form of the policy the contention of the plaintiff in error below was, that (1) "where a person insures property *generally*, he receives in case of loss the total loss on the property, whatever his interest may be; but when he insures a *specific* interest, then he recovers only the market value of the destroyed interest."

(2) That though "the question is one of intention as shown by the policy," yet as the policy shows only an intention to insure a limited interest "as contractor and builder," the market value, or what would be received on sale under a decree, and no more, can be recovered.

(3) "That the loss to be paid plaintiff is simply the amount of damage to his interest — *i. e.*, the amount to which the building has been impaired, as a security to him

under his lien," limited by the price that interest would bring upon a sale.

This amounts to saying that if the Royal Insurance Company had insured Stinson in the sum of $5,000 "upon the Webster House, in which he had an interest as builder and contractor," he could, in case of loss, recover the full value of the property destroyed, but as the insurance is "*upon his interest as contractor and builder*," he can recover only what he might get from a sale of the equity of redemption under a decree of sale — or the value of the building in the market above the mortgage."

If the question is one of intention of parties, to be gathered from the policy, in which the recitation is that Stinson has paid the insurance company $20 "for insuring from loss or damage by fire *the property hereinafter described*, . . . viz., $5,000 on his interest, as contractor and builder, in frame hotel building known as Webster House;"

In which there is a provision against other insurance on the property insured, and in which the agreement is "to pay or make good to the insured all such loss or damage by fire as shall happen to the property above mentioned;"

It is submitted, that to the common mind the word "property" is applicable rather to the "frame building" than to the word "interest." The former was "*real property*," the latter appears to be (at least in the opinion of the insurer) very precarious. The difference between an insurance upon "the property" in which he had an interest and upon Stinson's "interest in the property," is more nice than wise, especially when we consider that he can only recover, in case of loss, the amount of his insurable interest not exceeding the value of the property.

Ætna Ins. Co. v. *Jackson*, 16 B. Monr. 250.

"It is not the name of the right which gives or refuses an insurable interest; it is the character of the right. A specific lien gives an insurable interest, because a loss of the particular property is at once seen to affect disastrously the specific lienor."

Rohrback v. *Germania Ins. Co.*, 62 N. Y. 56.

See cases generally cited in this brief, and

Robert v. *Traders' Ins. Co.*, 17 Wend. 631.
Godin v. *London Ass. Co.*, 1 Burr, 489.

We may therefore conclude that Stinson's "interest in the Webster House," as used in this policy, means his insurable interest; and if had he insured "*the property*," he could (in case of loss) have recovered the full value thereof (not exceeding the $5,000), that he will not be prevented from doing so because he mentioned "*his interest*" in the property.

Gordon v. *Mass. F. & M. Ins. Co.*, 2 Pick. 249.
Springfield F. & M. Ins. Co. v. *Allen*, 43 N. Y. 395.
Wiggin v. *Merc. Ins. Co.*, 7 Pick. 271.
Holbrook v. *Brown*, 2 Mass. 280.

II.

Insurance of the assured's interest is equally an insurance of the thing if the payment of the whole value (in case of loss) is necessary to cover the interest protected. "The phrase, property hereby insured," says GARDENER, J. (*Mut. Safety Ins. Co.* v. *Hone*, 2 Coms. 235), "refers to the interest of the assured," quoted in

Fox v. *Phœnix Fire Ins. Co.*, 52 Me. 335.

"The interest of a mortgagee may be insured generally or specially — generally when he says nothing about his mortgage, specially when his interest is specified in a memorandum. . . . In the one case and in the other the subject of the insurance is apparently the *corpus* of the thing insured, and actually the interest of the party assured in it." If the absolute owner be insured he recovers the full value of the thing lost, because his interest is commensurate with its value. If the owner of a limited interest in it is insured, he recovers only to the extent of his interest." . . . "Notwithstanding the form of the contract, therefore, a mortgagee insures, whether generally or specially, not the ultimate safety of the whole of the mortgaged property, but only so much of it as may be enough to satisfy his mortgage. It is not the specific property, but its capacity to pay the mortgage debt. In effect the security is insured."

Smith v. *Ins. Co.*, 17 Pa. St. 260.
Haley v. *M'f'rs Ins. Co.*, 120 Mass. 292.

It seems to have been held that the insurance of an interest as mortgagee is the same in effect as the insurance of *the property* by the mortgagee.

Excelsior F. I. Co. v. *Royal Ins. Co.*, 55 N. Y. 343.
Stephens v. *Ill. Mut. F. Ins. Co.*, 43 Ill. 327.
Springfield F. & M. Ins. Co. v. *Allen*, 43 N. Y. 396-8.

"It has been settled in Massachusetts and in New York that a bona fide *equitable interest* in property of which the legal title is in another may be insured under the general name of property, or by a description of the thing insured."

Tyler v. *Ætna F. Ins. Co.*, 12 Wend. 512, 513;
(s.c.) 16 Wend. 385.

Excelsior F. I. Co. v. *Royal I. Co.*, 55 N. Y. 343.
Johnson v. *No. Brit. & M. Ins. Co.*, 1 Holmes, 118.
King v. *State M. F. Ins. Co.*, 7 Cush. 3.
Suffolk F. Ins. Co., v. *Boyden*, 9 Allen, 123.
Dobson v. *Land*, 8 Hare, 216.
Concord M. F. Ins. Co. v. *Woodbury*, 45 Me. 447.
Fenn v. *N. O. Ins. Co.*, 53 Ga. 578.

If he have a qualified property or interest his recovery will be restricted accordingly.

Niblo v. *N. A. F. I. Co.* 1 Sandf. 551.

This case, citing *Laurent* v. *Chatham F. I. Co.*, 1 Hall, 41, seems to show that upon loss the insurer may recover what will protect his interest, to the extent of the value of the property and up to the sum insured.

In that case the lessee (according to plaintiff in error), had there been a mortgage outstanding on the theatre under which he could have been turned out, would have recovered nothing, as really his interest was liable to be defeated by the mortgagee's entry to foreclose.

Some instances of the interests, having which, persons are allowed to insure the *corpus* of the thing, are found in decided cases.

e. g. As guarantor of a mortgage debt; and it is said, "An insurable interest may exist without any estate or interest in the *corpus* of the thing insured."

Springfield F. & M. Ins. Co., v. *Allen*, 43 N. Y. 395.
Gordon v. *Mass. F. & M. Ins. Co.*, 2 Pick. 249.

A commission merchant was allowed to insure his commissions upon the expected sale of a cargo, and to recover on the loss of the cargo.

Putnam v. *Mer. Mar. I. Co.*, 5 Met. 386.

A shareholder in the Atlantic Telegraph Company was allowed to recover in full upon an insurance of the cable upon the failure to lay the cable, which broke while being hauled in to remedy a defect in insulation, — one-half the cable being saved. It was held that the policy was upon the plaintiff's interest in the adventure, to wit, the attempt to lay the cable.

Wilson v. *Jones*, L. R. 2 Exch. 139.

A merchant, who has insured expected profits upon a cargo to be shipped, could insure such profits and protect his interest from loss by proper words.

McSwiney v. *Royal Exch. Ass.*, 14 Q. B. 634.
Anderson v. *Morice*, L. R. 10 C. P. 58.

Commissioners of the Crown, appointed to superintend the transportation of some Dutch vessels seized in time of peace, were allowed to recover.

Crauford v. *Hunter*, 8 D. & E. 13;
Approved in *Buck* v. *Chesapeake Ins. Co.*, 1 Pet. 163.

The administrator of an insolvent estate is said to be able to recover insurance upon real estate which might be liable to be sold for debts.

Herkimer v. *Rice*, 27 N. Y. 163.

Denio, C.J., considered that any creditor could insure the property of his debtor, from which he might be satisfied.

Rohrbach v. *Germania Ins. Co.*, 62 N. Y. 58.
See *Savage* v. *Howard Ins. Co.*, 52 N. Y. 502.
Clinton v. *Hope Ins. Co.*, 45 N. Y. 454.
Waring v. *Loder*, 53 N. Y. 581.

It has been decided that, though an estate be encumbered

to its full value, the party having a right to redeem has an insurable interest to the full value of the estate.

Strong v. *Manufacturers' Ins. Co.*, 10 Pick. 40.
Meckler v. *The Phœnix I. Co.*, 38 Wis. 665.
French v. *Rogers*, 16 N. H. 177.
Ins. Co. v. *Woodruff*, 26 N. J. L. (2 Dutch.) 541.
McDonald v. *Block*, 20 Ohio, 185.

One having such title as could be acquired by an agreement for a purchase, the terms of which had not been complied with, and though the vendor had power to rescind the contract, was held to have an insurable interest to the full value of the estate.

Ryder v. *Ocean Ins. Co.*, 20 Pick. 259.
Ætna Ins. Co. v. *Tyler*, 16 Wend. 385.
Ayres v. *Hartf. F. I. Co*, 17 Iowa, 176.
Wood v. *N. W. I. Co.*, 46 N. Y. 421.
Columbian Ins. Co. v. *Lawrence*, 2 Peters, 42.

In that case, MARSHALL, C. J., says: "The embarrassment of a man's affairs may be such that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it."

See *Franklin F. Ins. Co.* v. *Kindlay*, 6 Whart. 483.
See query in *Wheeler* v. *Ins. Co.*, 101 U. S. 441, and answer in *Gordon* v. *M. F. & M. Ins. Co.*, 2 Pick. 249.
Rohrback v. *Germania F. Ins. Co.*, 62 N. Y. 58.

It is not against the policy of the law that the amount of insurance held by different persons should exceed the value of the property insured, provided no one person has a policy for more than the entire value of the property.

Johnson v. *No. Br. & Mer. Ins. Co.*, 1 Holmes, 117.
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Johnson v. *No. Br. & Mer. Ins. Co.*, 1 Holmes, 117.
Columbia I. Co. v. *Lawrence*, 10 Pet. 512.

A has a house worth $10,000. B has a mortgage on that

house for $9,000. A may insure for $10,000; B may insure for $9,000; and both may recover the full amount of their insurance, $19,000. So far all courts agree.

The only disputed question is, whether the insurer is subrogated to the rights of B, as mortgagee, upon the payment of the $9,000.

See *Insurance Co.* v. *Updegraff*, 21 Pa. St. 513.

No such question arises in this case. Nor does the policy of the law require that the actual interest of the party should necessarily equal the sum insured. In one sense A's actual interest in the property is only $1,000. He must, to be sure, pay $9,000 for an unincumbered title to his property, but it will not necessarily be that he was bound to pay the $9,000, as he might not be personally liable on the mortgage note; and the maker of the note might be perfectly good.

There is no essential difference between the position of a lienor and the holder of a mere equity of redemption. Equities of redemption are treated like fees in Massachusetts, as regards levies, dower, etc. etc. (G. S. Mass., ch. 103, § 1; ch. 90, § 2.)

See *Hulsman* v. *Whitman*, 109 Mass. 411.
Wheeler v. *Insurance Co.*, 101 U. S. 442.

The Insurance Company, as was said in the charge, are to be assumed to have had the same knowledge of the state of the title as the plaintiff. There can be no pretence under the authorities that the policy was a wager.

The contract was this: That the Insurance Company would either put the buildings back into the condition in which they were before the fire, or it would pay the loss up to $5,000; and, the policy being an open one, the damages

are the amount of the assured's claim upon the buildings to the extent of the sum insured in the policy. No other rule of damages satisfies the wording of the contract. No other is easily applicable in practice. How can the assured be called upon to prove what sum might or might not be realized upon a warrant of sale obtained at the end of a lien suit; a subject which is mere matter of opinion, and affected by all sorts of contingencies, and not susceptible of proof at all; as MELLOR, J., says, in *Collingridge* v. *Royal, &c., As. Co.*, 3 Q. B. D. 177: "The defendants are quite mistaken in supposing that they have only to pay the plaintiff the amount of loss which, as between him and third persons, he may ultimately sustain."

See *Haley* v. *Manuf. I. Co.*, 120 Mass. 292.

If the Insurance Company had rebuilt the building, and Stinson by enforcing his lien had become the owner of Flint's interest, he would have then stood in the same position as Flint, the mortgagor, and could at least have carried out Flint's speculation of establishing a summer hotel, in the building of which was embarked $25,000 — $19,700 of it the *lienor's* money.

Suppose, being in this position, Flint had paid his mortgage notes, with or without suit, the land would have been freed, and Flint would have been obliged to redeem the property from the lien under the provisions of § 24 of chap. 150 of the General Statutes.

Again, Flint is still liable upon his notes, and so far as we know Stinson might have enforced his lien, and then, being in the position of Flint's assignee, he could have redeemed from the mortgage such portion of the land (say two acres at $300 per acre) as the mortgagor had the right

to do under the provision in the mortgage, as to redeeming certain lots.

III.

The lien being established as a right in the thing, like a mortgage by the statute (§ § 1, 33), the filing of a statement in the town clerk's office (§ 5) and of a petition to enforce the lien in court within a certain time (§ 7), are conditions subsequent, merely, upon the failure to do which, the lien is dissolved.

It has, therefore, been held, where the loss occurred before the lienor filed the statement of his lien, that such filing was unnecessary and that the lienor could recover the insurance.

Franklin Ins. Co. v. *Coates*, 14 Md. 285.

When the loss has occurred the rights of the lienor (the assured) are fixed, and he may proceed with his lien petition or not, as he pleases. The decree in the lien suit, if decided for or against the petitioner, is evidence that he had or had not a valid lien; and if the decree were against the petitioner it would be decisive against him in a suit with the insurance company, as it would show that he had no interest to insure.

See *Carter* v. *Humboldt Ins. Co.*, 12 Iowa, 287;
Stout v. *City F. Ins. Co.*, Ib. 371;

in which cases the lien suits went to judgment.

The entry of Neither Party is evidence only, and is certainly no evidence that, at the date of the policy, and at the time of the loss, the assured did not have an interest.

But if the lien exists at the time the interest is insured, and at the time of loss, it is sufficient for recovery.

IV.

Whatever the insurer's rights of subrogation might have been, the underwriter cannot complain that the lien was not kept alive for his benefit.

***Hooper* v. *Robinson*, 98 U. S. 539.**

Subrogation is an equitable right only. The Insurance Company has no reason to complain, since it has never asked to have the suit prosecuted for its benefit, but has always refused to pay the policy, and has always stoutly maintained that the lien was worthless. Subrogation only arises upon payment of the loss to the policy-holder. The insurer may still be subrogated to the assured's personal claims against Flint, to the extent of payment. After the destruction of the thing which gave value to the lien, it would have been a waste of money to have carried the lien suit to judgment, because the plaintiff's labor and materials, which added so much to the value of the land, had been swept away by the fire insured against, and the insurance company requested no continuance of the proceedings; on the contrary, it insists that it would have been to no purpose, so far as realizing money was concerned.

The insurer might, with equal propriety, insist that a mortgagee who was insured after the loss should put his mortgage-note in suit so as to avoid its being barred by the statute of limitations.

Respectfully submitted by

ROBERT D. SMITH.

APPENDIX.

GENERAL STATUTES OF MASSACHUSETTS.

Chapter 150.

Section 1. Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used, in the erection, alteration, or repair, of any building or structure upon real estate, by virtue of an agreement with, or by consent of, the owner of such building or structure, or any person having authority from, or rightfully acting for, such owner in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt so due to him, and the costs which may arise in enforcing such lien under this chapter; except as is provided in the following sections.

Sect. 2. Such lien for materials furnished shall not attach unless the person furnishing the same before so doing gives notice to the owner of the property to be affected by the lien, if such owner is not the purchaser, that he intends to claim such lien.

Sect. 3. Such lien shall not avail or be of force against any mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed.

Sect. 4. The owner of any such building or structure in process of erection or being altered or repaired, other than the party by whom or in whose behalf a contract for labor and materials has been made, may prevent the attaching of

any lien for labor thereon not at the time performed, or materials not then furnished, by giving notice in writing to the person performing or furnishing such labor, or furnishing such materials, that he will not be responsible therefor.

SECT. 5. Such lien shall be dissolved unless the person desiring to avail himself thereof, within thirty days after he ceases to labor on, or furnish labor or materials for, such building or structure, files in the office of the clerk of the city or town in which the same is situated, a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien, sufficiently accurate for identification, with the name of the owner or owners of the property, if known; which certificate shall be subscribed and sworn to by the person claiming the lien, or by some one in his behalf, and shall be recorded in a book kept for the purpose by the clerk of such city or town, who shall be entitled to the same fees therefor as for recording mortgages of equal length.

SECT. 6. No inaccuracy in such statement relating to the property to be covered by the lien, if the property can be reasonably recognized, or in stating the amount due for labor or materials, shall invalidate the proceedings, unless it appears that the person filing the certificate has wilfully and knowingly claimed more than is his due.

SECT. 7. Unless a suit for enforcing the lien is commenced within ninety days after the person desiring to avail himself thereof ceases to labor on, or furnish labor or materials for, such building or structure, the lien shall be dissolved.

SECT. 8. The lien may be enforced by petition to the

superior court in the county where the building or structure is situated. The petition may be filed in term, or in the clerk's office in vacation, and the date of the filing shall be deemed the commencement of the suit.

SECT. 9. When the amount of the claim does not exceed one hundred dollars, the lien may be enforced by petition to a justice of the peace, or police court; and such justices and courts shall have like power and authority within their jurisdiction as are herein conferred upon the superior court, with like rights of appeal to the parties as exist in other civil cases.

SECT. 10. The petition may be inserted in a writ of original summons, and be served, returned, and entered, as other civil cases.

SECT. 11. Whether filed as a petition, or inserted in such summons, the petition shall contain a brief statement of the contract on which it is founded, and of the amount due thereon, with a description of the premises subject to the lien, and all other material facts and circumstances; and shall pray that the premises may be sold, and the proceeds of the sale be applied to the discharge of the demand.

SECT. 12. The court may at any time allow either party to amend his pleadings as in actions at common law.

SECT. 13. Any number of persons who have actually performed labor or furnished labor or materials on one or more buildings or structures upon different lots of land, where the labor was performed for the same owner, contractor, or other person, may join in the same petition for their respective liens; and the same proceedings shall be had in regard to the rights of each petitioner, and the respondent may defend as to each petitioner in the same manner as if he had severally petitioned for his individual lien.

[Acts of 1871, Chapter 78.] "The court in which the petition is entered, or the clerk thereof in vacation, shall order notice to be given to the owner of the building or structure, that he may appear and answer thereto at a certain day in the same term or at the next term, by serving him with an attested copy of the petition with the order of the court or clerk thereon, fourteen days at least before the time assigned for the hearing; and the court, or the clerk thereof in vacation, shall also order notice of the filing of the petition to be given to the debtor and to all other creditors who have a lien of the same kind upon the same estate, by serving them with a copy of the last-mentioned order in like manner. In case the petition is entered in a municipal or police court, or before a justice of the peace, the day for such appearance and answer shall be fixed at not more than sixty days from the day of such entry." [Approved, March 3, 1871.]

Sect. 15. If it appears to the court that any of the parties entitled to notice are absent or that they cannot probably be found to be served with the notice, the court may, instead of the personal notice before mentioned, or in addition thereto, order notice to all persons interested, by publishing in some newspaper the substance of the petition, with the order of the court thereon, assigning the time and place for a hearing, or may order such other notice to be given, as may under the circumstances of the case be considered most proper and effectual.

Sect. 16. If at the time assigned for the hearing it appears to the court that any of the persons interested have not had sufficient notice of the suit, the court may order further notice to them, in such manner as may be considered most proper and effectual.

SECT. 17. At the time assigned for the hearing, or within such further time as the court allows for that purpose, every creditor having a lien of the kind before mentioned upon the same property, may appear and prove his claim, and the owner and each of the creditors may contest the several claims of every other creditor, and the court shall hear and determine them in a summary manner, either with or without a jury, as the case may require.

SECT. 18. Every material question of fact arising in the case shall be submitted to a jury, if required by either party or thought proper by the court; and the trial shall be had upon a question stated, or an issue framed, or otherwise, as the court may order. A jury shall be had before a justice of the peace, or police court, only as in other civil cases.

SECT. 19. The court shall ascertain and determine the amount due to each creditor who has a lien of the kind before mentioned upon the property in question; and every such claim due absolutely and without any condition, although not then payable, shall be allowed, with a rebate of interest to the time when it would become payable.

SECT. 20. When the owner fails to perform his part of the contract, and by reason thereof the other party without his own default is prevented from completely performing his part, he shall be entitled to a reasonable compensation for as much as he has performed, in proportion to the price stipulated for the whole, and the court shall adjust his claim accordingly.

SECT. 21. If the lien is established in favor of any of the creditors whose claims are presented, the court shall order a sale of the property to be made by any officer authorized to serve civil process between the same parties.

SECT. 22. If part of the property can be separated from the residue and sold without damage to the whole, and if the value thereof is sufficient to satisfy all debts proved in the case, the court may order a sale of that part, if it appears to be most for the interest of all parties concerned.

SECT. 23. The officer who makes the sale shall give notice of the time and place in the manner prescribed in relation to the sale on execution of a right of redeeming mortgaged lands, unless the court orders a different notice to be given.

SECT. 24. Any interest in real estate so sold may be redeemed in the manner provided in the case of a sale on execution of the right of redeeming mortgaged lands.

SECT. 25. If all the claims against the property covered by the lien are ascertained at the time of ordering the sale, the court may order the officer to pay over and distribute the proceeds of the sale, after deducting all lawful charges and expenses, to and among the several creditors, to the amount of their respective debts if there is sufficient therefor; and if there is not sufficient, then to divide and distribute the same among the creditors in proportion to the amount due to each of them.

SECT. 26. If all the claims are not ascertained when the sale is ordered, or if for any other reason the court finds it necessary or proper to postpone the order of distribution, it may direct the officer to bring the proceeds of the sale into court, there to be disposed of according to the decree of the court; and if by reason of the claims of attaching creditors, or for any other cause, the whole cannot be conveniently distributed at once, the court may make two or more successive orders of distribution, as the circumstances may require.

SECT. 27. If there is any surplus of the proceeds of the sale after making all the payments before mentioned, it shall be forthwith paid over to the owner of the property; but such surplus before it is so paid over shall be liable to be attached or taken on execution, in like manner as if it proceeded from a sale made by the officer on an execution.

SECT. 28. If the interest of the owner in the building, structure, or land, is under attachment at the time of filing and recording the statement of the account, the attaching creditor shall be preferred to the extent of the value of the buildings and land as they were when the statement was recorded; and the court shall ascertain by a jury or otherwise, as the case may require, what proportion of the proceeds of the sale shall be held subject to the attachment, as derived from the value of the property when the statement was recorded.

SECT. 29. If the attaching creditor recovers judgment he shall be entitled to receive on his execution the proportion of the proceeds held subject to his attachment, or as much thereof as may be necessary to satisfy his execution, and the residue of the proceeds shall be applied in the same manner as if there had been no such attachment.

SECT. 30. If the interest of the owner of the property is attached after the recording of the statement, the proceeds, after discharging all prior liens and claims, shall be applied to satisfy the execution of such attaching creditor, in like manner as is provided in chapter one hundred and thirty-three, in the case of two or more successive attachments or seizures in execution of a right of redemption.

SECT. 31. If an attachment is made after the recording of such statement, and if after the attachment another like

statement is recorded, the creditor in the latter statement shall be entitled to be paid only out of the residue of the proceeds remaining after paying all that is due on the demands, a statement of which is recorded before the attachment, and satisfying the attaching creditor.

SECT. 32. When there are several attaching creditors, they shall as between themselves be entitled to be paid according to the order of their attachments; but when several creditors who are entitled to the lien provided for in this chapter have equal rights as between themselves, and the fund is insufficient to pay the whole, they shall share it equally in proportion to their respective debts.

SECT. 33. If the person for whom the work is done, or materials are furnished, has an estate for life, or any other estate less than a fee simple, in the land, or if the property at the time of recording the statement is mortgaged, or under any other incumbrance, the lien before provided for shall bind his whole estate and interest therein, in like manner as a mortgage would have done; and the creditor may cause the right of redemption, or whatever other right or estate the owner had in the property, to be sold and applied to the discharge of his debt according to the provisions of this chapter.

SECT. 34. If the person indebted dies or conveys away his estate or interest before the commencement of a suit on the contract, the suit may be commenced and prosecuted against his heirs, or whoever holds the estate or interest which he had in the premises at the time the labor or materials were performed or furnished; or if a suit is commenced in his lifetime, it may be prosecuted against his executors, administrators, heirs, or assigns, in like manner as if the estate or interest had been mortgaged to secure the debt.

SECT. 35. If the creditor dies before the commencement of a suit, the suit may be commenced and prosecuted by his executors or administrators; or if commenced in his life-time, it may be prosecuted by them as it might have been by the deceased if living.

SECT. 36. Any party interested in a suit brought under this chapter may appeal to the Supreme Judicial Court, from the final decree or judgment of the Superior Court, as is prescribed in relation to other civil cases, and the cause shall be thereupon heard and determined in the Supreme Judicial Court, according to the provisions of this chapter.

SECT. 37. If it appears in any stage of the proceedings that the suit was commenced by the petitioning creditor before his right of action accrued or after it was barred, or if he becomes nonsuit, or fails to establish his claim, the suit may be prosecuted by any other creditor having such lien, in the same manner as if it had been originally commenced by him, if the circumstances of the case are such that he might then, or at any time after the commencement of the original suit, have commenced a like suit on his own claim.

SECT. 38. If the suit is commenced by the petitioning creditor before his right of action accrues, his claim may nevertheless be allowed, if the suit is carried on by any other creditor as provided in the preceding section; but he shall not in such case be entitled to costs, and he may be required to pay the costs incurred by the debtor, or a part thereof, as the court may deem reasonable.

SECT. 39. The costs in all other respects shall be subject to the discretion of the court, and shall be paid from the proceeds of the sale, or by any of the parties in the suit, as justice and equity require.

SECT. 40. Nothing contained in this chapter shall be construed to prevent a creditor in such contract from maintaining an action thereon at the common law, in like manner as if he had no such lien for the security of his debt.

SECT. 41. When a debt secured by such lien is fully paid, the creditor, at the expense of the debtor, shall enter on the margin of the registry where the statement is recorded, a discharge of his lien, or shall execute a release thereof, which may be recorded where the statement is recorded.

SECT. 42. All the regulations concerning the endorsement of original writs shall apply to the endorsement of petitions filed under this chapter.